IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1509

KIMON T. KARABATSOS

Petitioner,

v.

REIN J. VANDER ZEE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered December 21, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, unreported, appears in Appendix A.

The March 3, 1977 opinion of the United States District Court for the District of Columbia, also unreported, appears in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered December 21, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* was denied February 8, 1979. This petition was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the court of appeals erred in overturning the trial court's conditional grant of a new trial.

PROVISIONS OF LAW INVOLVED

This case involves Rules 50 and 59 of the Federal Rules of Civil Procedure.

STATEMENT OF CASE

This action was brought by a Washington lawyer against a licensed real estate broker to obtain a one-third "forwarding fee" for the broker's successful attempt to lease a building to the United States Government. The lawyer had introduced the broker to the building owner. Although he admitted he had done little else, the lawyer contended he had an oral contract to obtain one-third of any fee earned by the broker.

The jury returned a verdict for the lawyer. The conscience of the trial court was sufficiently shocked

by the verdict that it granted the broker's motion for judgment notwithstanding the verdict, entered judgment for defendant and conditionally granted defendant's alternative motion for a new trial. (Appendix B)

The lawyer appealed to the court of appeals, which reversed the entry of judgment *n.o.v.* and overturned the trial court's conditional grant of a new trial. The case was remanded solely for a decision on whether to grant a new trial limited to the issue of damages.

A petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals.

TRIAL COURT JURISDICTION

Jurisdiction of the trial court was invoked pursuant to 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision on the District Court's Conditional Grant of a New Trial Is Erroneous and Is in Conflict with Decisions of Other Circuits

Under Rule 50 (c)(1) of the Federal Rules of Civil Procedure, the trial court is required to rule on an alternative motion for a new trial when it grants a motion for judgment notwithstanding the verdict. The trial court below conditionally ordered a new trial in the event that the entry of judgment *n.o.v.* was reversed on appeal.

Rule 59(a) of the Federal Rules of Civil Procedure provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United

States. . . ." The power of a trial court to order a new trial is broad and may be based, *inter alia*, on the court's conclusion that the verdict is against the weight of the evidence or generally unjust. 6A *Moore's Federal Practice* ¶ 59.08, at 59-102 (2d ed. 1974).

On a motion for new trial

> it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941).

Rule 50 (c) of the Federal Rules of Civil Procedure was adopted in 1963. By and large, the rule was intended to codify the procedures which had been followed earlier by the courts of appeals in accordance with the dictates of this Court announced in *Montgomery Ward* v. *Duncan*, 311 U.S. 243 (1941). Federal Rules of Civil Procedure, Rule 50 (c), Notes of Advisory Committee on Rules, 1963 Amendment, 28 U.S.C.A.

Montgomery Ward and Rule 50 (c) make it clear that the motion for judgment *n.o.v.* and the alternative motion for a new trial depend on different grounds. The motion for judgment *n.o.v.* cannot be granted unless a verdict should have been directed for the movant, while the motion for a new trial may invoke the discretion of the trial court insofar as it claims that the verdict is against the weight of the evidence, that the damages are excessive or inadequate, or that, for other reasons, the trial was not fair to the movant.

A substantial degree of inter-circuit disparity has developed relative to the standards to be applied by an appellate court to a conditional grant for a new trial where the judgment *n.o.v.* is reversed on appeal.

The Fifth Circuit apparently will reverse a conditional grant of a new trial only if the evidence is "overwhelmingly" in favor of the non-moving party. *See Powell* v. *Lititz Mutual Insurance Co.*, 419 F.2d 62, 66 (5th Cir. 1969). Absent such "overwhelming" evidence, in situations where the judgment *n.o.v.* is reversed, and the trial court has conditionally granted a motion for a new trial, the case is remanded to the trial court for a new trial.

The Ninth Circuit pays great deference to the discretion of a trial judge in making a conditional grant of a new trial. In *Acme Granite & Tile Co.* v. *F.D. Rich Co.*, 437 F.2d 549 (9th Cir. 1970), *cert. denied*, 404 U.S. 823 (1971), the court held there must be a "clear showing of an abuse of discretion" to reverse a conditional grant of a new trial.

The Sixth Circuit goes almost as far as the Ninth Circuit, requiring a showing of "abuse of discretion" to warrant reversal by the appellate court of the trial court's conditional grant of a new trial. *Compare Dice* v. *Commercial Union Assurance Co.*, 334 F.2d 673 (6th Cir. 1964) *with Ross* v. *Chesapeake & Ohio Railroad*, 421 F.2d 328 (6th Cir. 1970).

The Third Circuit has a limited "closer scrutiny" rule. When the trial court conditionally grants a new trial on a "weight of the evidence" theory, the Third Circuit will exercise a closer degree of scrutiny than

is the case when a new trial is conditionally granted because of some legal error. *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

Other inter-circuit disparaties abound with regard to the proper role of the appellate courts in checking the discretionary power of a trial court to conditionally grant a new trial. See 5A *Moore's Federal Practice* ¶ 50.14, at 50-121 nn. 5 & 6 (2d ed. 1977).

In the District of Columbia Circuit, the general rule heretofore has been that a motion for new trial is addressed to the sound discretion of the trial judge, and it must be left standing absent a showing of abuse of discretion. *Luck* v. *Baltimore & Ohio Railroad Co.*, 166 U.S. App. D.C. 283, 510 F.2d 663 (1975). The Third Circuit's closer scrutiny approach (*Lind* case, *supra*) was originally given some vitality in the District of Columbia Circuit in *Taylor* v. *Washington Terminal Co.*, 133 U.S. App. D.C. 110, 409 F.2d 145 (1969). Now, in the case at bar, the District of Columbia Circuit appears to have adopted a "strict scrutiny" test when the trial court conditionally grants a new trial on a "weight of the evidence" theory. It has also complicated the disparity between the circuits.

In the instant case, the District of Columbia Circuit apparently reversed the trial court's conditional grant of a new trial on the grounds that the trial court failed to set forth detailed reasons leading to its conclusion that the jury's verdict was "against the weight of the evidence" and would result in a "miscarriage of justice." The focus of this reasoning is more on notions of procedural due process than on substance. Thus, the Third Circuit rationale underlying *Lind* v. *Schenley Industries, Inc., supra*, 278 F.2d 79 (3d Cir. 1960),

cert. denied, 364 U.S. 835 (1960), was expanded in derogation of the discretionary powers of the trial judge.

The trial judge's traditional role, in part, is to serve as a check on the jury's authority to decide issues of fact. He may avoid what in his professionally-trained and experienced judgment is a particularly unjust verdict by vacating it and causing the matter to be tried again by a second jury. The judge's duty is essentially to see that there is no miscarriage of justice. *See* 6A *Moore's Federal Practice* ¶ 59.08 [5], at 59-152 to 59-165 (2d ed. 1977).

This case clearly failed to pass the trial court's "smell test." The simple proposition that a lawyer could get one-third of a real estate broker's commission, just for an introduction made in a Capitol Hill bar, apparently was too much for the trial court.

The decision herein unduly limits the trial judge's discretion in granting a new trial on the grounds that the verdict is "against the weight of the evidence" or that a "miscarriage of justice" would occur if the verdict is allowed to stand. Under the approach taken by the District of Columbia Circuit, the trial judge would be forced to articulate every judgment he makes during the course of trial which leads him to grant a new trial.

II. The Court of Appeals Failed to Deal with Three Issues Central to the Decision of the Trial Court

A. The Court Of Appeals Failed To Consider The Necessity For Mutual Assent Or Manifestation Of Agreement

In entering judgment *n.o.v.*, the trial court focused on the necessity for mutual assent or manifestation

of agreement to establish the existence of a binding contract. However, the court of appeals limited its review to the question of whether there was *any* evidence presented to the effect that there may have been a gratuitous offer by petitioner to split his fee with respondent. The panel did not consider whether, in the total circumstances of this case, such a gratuitous offer, even assuming it were tendered, gave rise to a binding contract between the parties. In the context of this dispute, the distinction is crucial.

B. The Court Of Appeals Ignored Public Policy By Enforcing An Oral Contingent Fee Agreement Relating To A Government Contract

The Court of Appeals concluded that the alleged contract did not run afoul of 41 U.S.C.A. § 254(a), which prohibits fee-splitting arrangements incident to the procurement of contracts with the United States. The trial court reached the same conclusion, noting that "[t]echnically the alleged contract . . . may not violate the rules of law prohibiting contingent fees for securing Government contracts . . ." but "it partakes of the same evil sought to be avoided by those rules of law . . ." and therefore is against public policy. (Appendix B, at 5-6)

A contract, albeit technically not in violation of positive law, may be deemed unenforceable as inconsistent with sound public policy. *See Providence Tool Co.* v. *Norris*, 69 U.S. (2 Wall) 45, 54 (1864); 6A *A. Corbin, Contracts* § 1374, at 5-6 (1962). Such public policy may be determined by considering constitutions, statutes, decisions of courts, executive orders, ethical standards or custom and practice. Indeed, "[i]n

determining what public policy requires, there is no limit whatever to the sources to which the court is permitted to go." 6A *A. Corbin, Contracts* § 1375, at 19 (1962).

C. The Court Of Appeals Failed To Treat A Substantial Legal Ethics Question Raised By This Case

Respondent is licensed to practice law in the District of Columbia and is, therefore, subject to the provisions of the Code of Professional Responsibility adopted there. To the extent he was acting *qua* lawyer in the circumstances of this case, he would have been in violation of Disciplinary Rules 5-107 (A)(1), (2) and Disciplinary Rule 2-106 (A) of the Code of Professional Responsibility. The opinion of the court of appeals did not cover this subject.

CONCLUSION

For the foregoing reasons this petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1487

REIN J. VANDER ZEE, APPELLANT

v.

KIMON T. KARABATSOS, ET AL.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 76-0468)

Argued September 25, 1978

Decided December 21, 1978

Judgment entered this date

Walter T. Charlton for appellant.

Kenneth A. Lazarus, with whom *James J. Bierbower* was on the brief, for appellee.

Before TAMM and ROBB, *Circuit Judges*, and WILLIAM B. JONES,* *Senior United States District Judge for the District of Columbia.*

Opinion for the court filed by *Senior District Judge* JONES.

JONES, *Senior District Judge*: This case involves an alleged oral contract entered into between the plaintiff-appellant Rein J. Vander Zee and the defendant-appellee Kimon T. Karabatsos. In the trial below, the jury returned a verdict in favor of the plaintiff-appellant. The District Court then overturned the jury's determination by issuing a judgment notwithstanding the verdict (n.o.v.) pursuant to Federal Rule of Civil Procedure 50 (b). The Court also contingently granted a new trial under Rule 50(c). Vander Zee has appealed from these rulings. For reasons stated herein, we reverse the entry of judgment n.o.v. and remand for a decision on whether to grant a new trial limited to the issue of damages.

I. INTRODUCTION

The complaint in this action was brought by Rein J. Vander Zee, an attorney licensed to practice in the District of Columbia and Texas. Appellant Vander Zee is attempting to recover funds that allegedly are owed to him by Kimon Karabatsos, the defendant-appellee.

In early 1975, Vander Zee was approached by William H. Savage, President of Savage/Fogarty, a real estate management firm, in connection with certain leasing difficulties that faced the company. The two men were acquainted because they previously had shared law offices. On this occasion, Savage requested Vander Zee to assist the company in renegotiating a lease between the General Services Administration [hereinafter the "GSA"] and the Savage/Fogarty Company. The lease involved certain

* Sitting by designation pursuant to 28 U.S.C. § 294(c).

office space located at 1800 North Kent Street, Rosslyn, Virginia. The Savage/Fogarty Company had bought the property at a court ordered bankruptcy sale, and the previous owners' lease with the GSA required renegotiation in view of the bankruptcy and forced sale of the building.

Vander Zee declined Savage's request for direct assistance, explaining that extensive commitments in Texas left him with too little time to "keep on top of" the renegotiation sessions. Vander Zee did, however, offer to help find someone capable of advising Savage/Fogarty on the leasing matter.

Savage accepted Vander Zee's offer to refer a person capable of handling the GSA renegotiations. Indeed, according to Vander Zee, Savage suggested that Vander Zee be compensated for the referral service by splitting the fees eventually earned by the as yet undetermined third party. (Tr. at 94.) At trial, Savage denied making such a suggestion. (Tr. at 16-17.)

Vander Zee began to consider candidates who might qualify for the leasing negotiations needed by the Savage/Fogarty Company. Appellant Vander Zee claims that his screening process stretched over a six week period, and involved consideration of approximately two hundred people. Only two individuals, however, actually were contacted. (Tr. at 128.)

During this period, Vander Zee solicited the advice of Oliver Dompierre, the assistant to the Minority in the United States Senate. Dompierre recommended the appellee, Kimon T. Karabatsos. Karabatsos was not a lawyer, but was a licensed real estate broker in Virginia who had been self-employed as a business and government consultant for the past six years.

Vander Zee then contacted Karabatsos, and discussed the matter with him. Having concluded that Karabatsos

was an acceptable candidate for the job, Vander Zee arranged a meeting between Karabatsos and William J. Fogarty, who appeared on behalf of the Savage/Fogarty Company. The meeting took place at the "116 Club," a private club in which both Vander Zee and Karabatsos were members.

Subsequent to this introduction, Vander Zee invited Karabatsos to his home for a breakfast meeting. It was on this occasion that the parties allegedly entered an oral agreement that enlisted Vander Zee to one third of all compensation earned by Karabatsos for work done in renegotiating the GSA lease. (Tr. at 57-59; 99-100.)

Vander Zee brought suit in the District Court to enforce the oral agreement. A jury returned a verdict in favor of the plaintiff-appellant Vander Zee, awarding him "[o]ne third (⅓) of total monies received by the defendant and future monies to be received during the term of the lease with GSA." The District Judge overturned the jury finding by entering a judgment notwithstanding the verdict. He concluded that there was no substantial evidence of an oral agreement for the splitting of fees between Vander Zee and Karabatsos and that even if a contract did exist, it could not be enforced because it would constitute illegal "influence peddling" in the procurement of government contracts. The District Court also granted the defendant's motion for a new trial on the grounds that the verdict was against the weight of the evidence. It did not reach the defendant's alternative grounds for a new trial, excessive damages.

II. The Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict should not be granted unless the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict. *Luck* v. *Baltimore & Ohio Railroad Co.*, 166 U.S.

App. D.C. 283, 510 F.2d 663 (1975); *O'Neil* v. *W. R. Grace & Co.*, 410 F.2d 908 (5th Cir. 1969); *Bennett* v. *D.C. Transit System, Inc.*, 111 U.S. App. D.C. 411, 298 F.2d 325 (1962); *McWilliams* v. *Shepard*, 75 U.S. App. D.C. 334, 127 F.2d 19 (1942); *McCarthy* v. *Cahill*, 249 F. Supp. 194 (D.D.C. 1966); 5A J. Moore, Federal Practice ¶ 50.07[2] (3d ed. 1977). As this Court pointed out in *Lester* v. *Dunn*, 143 U.S. App. D.C. 399, 475 F.2d 983 (1973), the standard for awarding a judgment n.o.v. is the same as that applied when ruling on a motion for a directed verdict. And in *Alden* v. *Providence Hospital*, 127 U.S. App. D.C. 214, 216, 382 F.2d 163, 165 (1967), we carefully delineated that standard:

> The test to be applied in ruling on a motion for a directed verdict made at the close of the plaintiff's case is clear and uncontested in this litigation. Unless the evidence, along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant, the motion must be denied.

See also Princemont Construction Co. v. *Smith*, 140 U.S. App. D.C. 111, 433 F.2d 1217 (1970).

Application of this standard to the facts of the case before us compels this Court to conclude that the District Court improvidently granted a judgment n.o.v. The record supplies ample evidence to support a jury finding that Vander Zee and Karabatsos entered into an enforceable oral contract. Specifically, the jurors heard Vander Zee testify that Karabatsos agreed to a division of fees at their breakfast meeting in consideration for referral of the Savage/Fogarty business.[1] Rita Crossen backed up

[1] On direct examination, when asked whether he and Karabatsos had come to an agreement at their breakfast meeting, Vander Zee responded: "Yes, we did. I told Mr. Karabatsos

Vander Zee's account of the breakfast meeting. Mrs. Crossen, who was married to Vander Zee at the time of the transaction, was present at the meeting and testified that Karabatsos explicitly agreed to a split of the fees.[2]

In addition to this direct testimony, the jury could have drawn inferences from other evidence to conclude that an oral contract existed between the parties. For example, the very occurrence of an early-morning breakfast meeting at the home of Vander Zee, on the day after Karabatsos' introduction to Fogarty, might itself imply that an important discussion between Vander Zee and Karabatsos took place at the time. Additionally, Dompierre's testimony concerning discussions with Karabatsos about a fee splitting arrangement with Vander Zee

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that if he was interested in pursuing the work, that I would see that he got the work, and that the agreement would be that he would make a division of fees and give me one third of the gross fee to me [sic] as consideration for seeing that he got the business. I think his actual words were, 'No problem at all.' Something to that effect." (Tr. at 99-100.)

[2] Mrs. Crossen recounted the crucial meeting as follows:

Q. "Did there come a time in the morning when you began to pay attention? [to the conversation between Vander Zee, her husband, and Karabatsos].
A. Yes.
Q. Would you explain that to the Court, please?
A. Well, my ears perked up, I guess you might say, when they started discussing the arrangement of fee between the two of them, my husband referring the business to Mr. Karabatsos. I remember that very well.
Q. And what was the substance of that conversation, if you recall it?
A. Rein, my husband, said to Mr. Karabatsos, 'It's a usual referral fee between the two of us, a third for me and two-thirds for you.' At that moment I was handing Mr. Karabatsos a second cup of coffee when he said, Rein said, 'Is that agreeable with you?' And Kim said, 'Yes, of course.'" (Tr. at 58-59.)

might support an inference that an oral contract existed between the parties.[3]

Thus, the evidence presented before the Court, along with all reasonable inferences drawn from it, was not so one-sided that no reasonable jurors could find that an oral contract existed between Vander Zee and Karabatsos. The jury properly could have concluded, as it did, that words exchanged at the breakfast meeting manifested the requisite mutual assent of Vander Zee and Karabatsos to enter into a binding contract.[4] A judgment n.o.v. therefore was not appropriate. As Judge Goldberg stated in *Powell* v. *Lititz Mutual Insurance Co.*, 419 F.2d 62, 64 (5th Cir. 1969):

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[3] On direct examination, Mr. Dompierre testified, in part as follows:

Q. "Did there come a time in your office when Mr. Karabatsos admitted to a financial arrangement between the two? [Vander Zee and Karabatsos]
A. No. I told him that Mr. Vander Zee expected part of the fee.
Q. And what was his reply?
A. He had no objection to Mr. Vander Zee making part of the fee. That's what he told me." (Tr. at 75.)

[4] Such a contract would not be void as against public policy. It did not violate 41 U.S.C. § 254(a), the statutory proscription against government "influence peddling." That provision prohibits a contractor such as Savage/Fogarty from employing someone to solicit or secure a government contract on a contingent fee basis. In the present case, however, Savage/Fogarty entered no contingent fee arrangement with any party in an attempt to procure the GSA leasing contract. Their ownership of the Rosslyn office building put them in a direct negotiating position with the GSA. The contingent fee arrangement between Karabatsos and Vander Zee thus was unrelated to the procurement of a government contract. Indeed, throughout the trial, representatives of the Savage/Fogarty Company denied entering into any contingent fee arrangement with Vander Zee. Any such agreement was a matter between only Karabatsos and Vander Zee.

A judgment notwithstanding the verdict is permissible only when without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict. *Brady* v. *Southern Railroad*, 320 U.S. 476 (1943). In other words, where, as here, there is substantial conflicting evidence a judgment notwithstanding the verdict is improper.

III. The Decision to Grant a New Trial

Pursuant to Rule 50(c),[5] the District Judge made a conditional decision on the defendant's motion for a new trial. He granted the motion, on the grounds that the jury's verdict was against the weight of the evidence and was void, being a "miscarriage of justice." He did not reach the alternative grounds of excessive damages that the defendants advanced.

As implied by Rule 50(c)'s language, this Court has the duty to review the appropriateness of the trial court's conditional grant of a new trial. The rule states, in part, that "the new trial shall proceed *unless the appellate*

[5] Rule 50(c)(1) of the Federal Rules of Civil Procedure states:

> "If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court."

court has otherwise ordered," (emphasis added) and the Supreme Court has interpreted this language as giving the appellate court the power to grant or deny a new trial in appropriate cases. *Neeley* v. *Eby Construction Co.*, 386 U.S. 317, 323 (1967).

Generally speaking, we review the trial court's Rule 50(c) decision on the motion for a new trial for any abuse of discretion. *Luck* v. *Baltimore & Ohio Railroad Co., supra; Ryen* v. *Owens*, 144 U.S. App. D.C. 332, 446 F.2d 1333 (1971); *Taylor* v. *Washington Terminal Co.*, 133 U.S. App. D.C. 710, 409 F.2d 145 (1969); *Rankin* v. *Shayne Brothers, Inc.*, 98 U.S. App. D.C. 214, 234 F.2d 35 (1956). At one time, this standard of review was applied with little force so that the trial court's decision was nearly unassailable. The majority in *Bennett* v. *D.C. Transit System, Inc., supra* at 326, for example, held that "the ruling of a trial judge on an alternative motion for a new trial is ordinarily not *reviewable*. . . . It is appropriate that [the trial court's] . . . discretion be respected." (emphasis in text) *See also Eastern Air Lines* v. *Union Trust Co.*, 99 U.S. App. D.C. 255, 239 F.2d 25 (1957). In recent years, however, this Circuit has followed others in developing a more sophisticated review of new trial determinations. The landmark Third Circuit case of *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, *cert. denied*, 364 U.S. 835 (1960), started the trend by recognizing that the degree of appellate scrutiny of new trial rulings should depend on the reasons given for the awarding of a new trial. The court distinguished between cases in which a new trial is granted because of some legal error, and cases in which the trial judge simply reweighed evidence already submitted to a jury. While grants of new trial motions based on legal error should be routinely affirmed, the *Lind* court found the second context to be more problematic. As it explained:

> [When the trial court grants a new trial on a "weight of evidence" theory,] the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate court tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial. 278 F.2d at 90.

This Circuit has adopted the *Lind* approach to appellate review of new trial orders in *Taylor* v. *Washington Terminal Co., supra.*[6] As in *Lind*, the *Taylor* court emphasized the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.[7] In view of this danger, we noted that

[6] The court in *Taylor* v. *Washington Terminal Co., supra,* overturned a trial judge's order for a new trial that was based on excessive damages. At footnote 13 of the opinion, Judge Wright noted that in doing so, "we follow the lead taken by the Third Circuit [in the *Lind* case]." For a discussion of the *Taylor* court's rationale, see text accompanying notes 7 & 8, *infra.*

Judge Fahy's dissent in *Bennett* v. *D.C. Transit System, Inc., supra,* was a precursor to the *Taylor* opinion. In dissent, Judge Fahy took issue with the majority's conclusion that the trial court's order for a new trial, based on the judge's conclusion that the verdict was against the weight of the evidence, should be upheld. He stated that "It is in derogation of the jury function, as it seems to me, for the conclusion they reached, attributable to no error of law, not to be given effect." *Bennett* v. *D.C. Transit System, Inc., supra* at 327. Judge Fahy then quoted extensively from *Lind* v. *Schenley Industries, Inc., supra,* concluding that in the case before him, as in *Lind,* the evidence was sufficient to enable the jury to find for the plaintiff, and thus the jury's verdict should not be abrogated by a new trial order.

[7] 409 F.2d at 148.

closer appellate scrutiny is required when the trial court *grants* a new trial than when the court denied the motion and stands by the jury's conclusion.[8] The *Lind* court, of course, went one step further by pointing out that some reasons for granting new trials deserve more deference than others. When the trial court has ordered a new trial because of legal error, the appellate court should be more inclined to affirm the grant than when the trial court simply weighs the evidence differently than the jury and orders a new trial because the verdict is "against the weight of the evidence."[9]

Applying this standard to the case before the court, we find that we must overturn the trial court's grant for a new trial insofar as it is based on the grounds that the jury's verdict is against the weight of the evidence. As discussed above in the context of the judgment n.o.v., there was testimony to support the jurors' decision that an oral contract existed between Vander Zee and Karabatsos. The trial court's contrary view of the credibility of the witnesses does not justify the granting of a new trial.

The District Court also granted a new trial in order to prevent "a miscarriage of justice." We conclude that this also is an inadequate rationale for a new trial in view of our determination that the alleged contract between Vander Zee and Karabatsos would be valid and enforceable.[10] More troubling, however, is the fact that the District Court specifically did not reach the question whether a new trial should be granted on the issue of damages. Although we have registered our reluctance to perfunctorily affirm grants of new trials based on excessive damages, *Taylor* v. *Washington Terminal Co., supra,* we

[8] *Id.*

[9] 278 F.2d at 90.

[10] *See* note 4 *supra.*

recognize that the District Court should have an opportunity to consider this ground for a new trial. *Ryen* v. *Owens, supra; Rankin* v. *Shayne Brothers, Inc., supra;* 6A J. Moore, Federal Practice ¶ 59.08[6] (3 ed. 1974).

Thus, we must remand this case so that the District Court can make its determination whether a new trial on the damages issue is appropriate.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0468

REIN J. VANDER ZEE,

Plaintiff,

v.

KIMON KARABATSOS,

Defendant.

Filed Mar. 3, 1977

MEMORANDUM OPINION

This is a case sounding in contract. The matter now before the Court is defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. For the reasons set forth below, the Court will grant defendant's motion for judgment notwithstanding the verdict and conditionally grant his motion for a new trial.

The plaintiff, Rein J. Vander Zee, alleged that he entered into an oral contract with the defendant, Kimon Karabatsos, under which Karabatsos was to pay Vander Zee one-third of the fees Karabatsos earned from "business" Vander Zee promised to "deliver" to Karabatsos. Apparently, Vander Zee had been approached by William H. Savage, President of Savage/Fogarty Properties, Inc. Savage told Vander Zee that his firm needed an agent to negotiate with

the General Services Administration (GSA) regarding the acquisition of a new lease on property managed by Savage/Fogarty. Vander Zee agreed to help Savage find an agent. While conversing with a friend in a private club, Vander Zee asked the friend if he knew someone capable of negotiating with the GSA concerning a lease. The friend looked around the club and, noticing Karabatsos, suggested Karabatsos might be a good man for the job. Prior to this time, Vander Zee and Karabatsos had been acquainted, but did not know each other well. Vander Zee and Karabatsos thereupon sat down alone and had a general discussion concerning the Savage/Fogarty interest in the GSA lease. Vander Zee arranged for William J. Fogarty, Savage's associate in the Savage/Fogarty firm, to meet Karabatsos. Karabatsos and Fogarty met and agreed to discuss further the possibility of their association. Up to this time, Vander Zee and Karabatsos had not discussed the matter of a contract or the possibility that Vander Zee might request a "fee" for his "services."

Some time after the meeting between Fogarty and Karabatsos, Vander Zee and Karabatsos agreed that Karabatsos would stop by Vander Zee's apartment the next morning. This meeting marks the point where the stories of the two parties diverge in material respects. Allegedly, it was at this meeting that an oral contract was made. Vander Zee alleges that he told Karabatsos that he, Vander Zee, would "deliver" the Savage/Fogarty "business" to Karabatsos provided Karabatsos paid him one-third of any fees Karabatsos earned from Savage/Fogarty. Vander Zee alleges that Karabatsos agreed to this arrangement. The fact that plaintiff is a member of the bar and by his own testimony one experienced in contract matters alone casts serious doubt on the credibility of plaintiff's version. Karabatsos maintains he and Vander Zee discussed the Savage/Fogarty organization and exchanged other pleasantries at the breakfast meeting, but never entered into a contract, oral or written, under which Karabatsos agreed

to share a definite portion of his fees wth Vander Zee. Vander Zee further alleges that he "delivered" on his "promise" by calling Fogarty and designating Karabatsos as his "choice" for the position with the Savage/Fogarty firm. Evidence adduced at the trial showed that Fogarty made his own assessment of Karabatsos and ultimately hired him to negotiate with the GSA. In his contract with Savage/Fogarty, it was agreed that Karabatsos' compensation from Savage/Fogarty would include, among other payments, a percentage of the rentals on the lease he negotiated with the GSA.

After a trail on the merits, the jury returned a verdict for plaintiff assessing damages as "[o]ne third (1/3) of total monies received by the defendant and future monies to be received during the term of the lease with G.S.A."

A. The Motion for Judgment Notwithstanding the Verdict.

The motion for judgment notwithstanding the verdict ("judgment n.o.v.") must be denied if there is any substantial evidence, viewed in the light most favorable to plaintiff, supporting the verdict. If reasonable men might differ as to the conclusions of fact to be drawn, the motion must be denied. C.A. Wright, Federal Courts § 95, at 473 (3d ed. 1976). In order to support the verdict in this case, there must be some substantial evidence of the contract, the breach, and the damages awarded. Among the requisites of a contract are: (1) mutual assent and (2) an agreement that is not void. 1 Williston on Contracts § 18 (3d ed. 1957). Sufficient consideration is also a requirement but is not particularly germane to this discussion. After considering all the evidence in the light most favorable to the plaintiff, the Court has concluded that there was not sufficient evidence of these two aforementioned requisites to withstand the defendant's motion for judgment notwithstanding the verdict.

In the law of contracts, it is elementary that mutual assent must be proven by showing overt acts of assent and manifestations of agreement moving from the promisor to the promisee. 1 Williston on Contracts § 22, at 48 (3d ed. 1957). This is how the plaintiff proves an "intent to contract." Under the objective theory of contracts which has been dominant in American law for at least a century, it is only necessary to show the overt acts and manifestations and the promisor's intent to do the acts. *Id.* §§ 21, at 39, 22, at 48; J. Calamari & J. Perillo, Contracts §§ 11-12 (1970); *see Ottenberg* v. *Ottenberg*, 194 F. Supp. 98, 103 (D.D.C. 1961).

In the trial of this case, there was no substantial evidence of overt acts by Karabatsos and manifestations of agreement moving from him to Vander Zee, nor of Karabatsos' intent to do any acts constituting a manifestation. In the context of this case, the inadequacy of any detriment suffered by Vander Zee speaks weightily to the issue of Karabatsos' failure to assent to the terms of the alleged contract, even though the inadequacy of detriment in a different factual setting might not prevent it from constituting sufficient consideration. Likewise, the lack of any substantial evidence that Vander Zee was in a position to personally "deliver" the Savage/Fogarty business, indicated by Forgarty's independent assessment of Katabatsos' suitability, speaks to the issue of the lack of mutual assent. Parties may contract to do something which is impossible or over which they have only limited power, 6 Williston on Contracts § 1934 (rev. ed. 1938), but it is generally assumed they do not intend to bargain, if they know of the impossibility. 1 Williston on Contracts § 18, at 34-35 (3d ed. 1957). In summary, no reasonable man could believe that Karabatsos assented to the terms of the agreement alleged by Vander Zee. Since there is no substantial evidence of an intent to bargain and therefore of mutual assent, the motion for judgment n.o.v. must be granted.

Finally, even if there were substantial evidence of the other requisities of a contract, the Court would not enforce

the alleged agreement because it perceives it to be void as against public policy. Federal courts have long condemned and refused to enforce contracts for "influence peddling" in the procurement of government contracts. *E.g., Providence Tool Co.* v. *Norris*, 69 U.S. (2 Wall.) 45 (1864); *Le John Mfg. Co.* v. *Webb*, 222 F.2d 48 (D.C. Cir. 1955); *McNeill* v. *Nevius*, 187 F.2d 81 (D.C. Cir. 1950); *see* Barron & Munves, *The Government Versus the Five Percenters: Analysis of Regulations Governing Contingent Fees in Government Contracts*, 25 Geo. Wash. L. Rev. 127 (1957); Note, 69 Harv. L. Rev. 1280 (1956). A federal statute requires that Government contracts contain a warranty that the contractor has not retained or employed any person for a contingent fee to solicit or secure the contract *except* bona fide employees or established commercial or selling agencies maintained by the contractor for securing business. 41 U.S.C. § 254(a) (1970). President Woodrow Wilson wrote of a predecessor provision that its "single object was to prevent the contingent fee based on no real service whatsoever." Letter from Woodrow Wilson to Secretary of War Newton D. Baker, August 10, 1918, *quoted in* Barron & Munves, *supra* at 131. Most federal courts refuse to enforce contracts violating the warranty. *E.g., Le John Mfg. Co.* v. *Webb*, 222 F.2d 48 (D.C. Cir. 1955); *Mitchell* v. *Flinkote Co.*, 185 F.2d 1008 (2d Cir.), *cert. denied*, 341 U.S. 931 (1951).

Vander Zee testified that Savage originally approached him about taking the position in question. He testfied further that when he indicated to Savage that he did not have time to take on the job, Savage asked him to help find a qualified person. Vander Zee said he agreed to do so and to provide any assistance he could to the person he found. Finally, Vander Zee, although originally naming Savage/Fogarty as parties defendant, stated that he and Savage agreed that Vander Zee would "look to" the person Vander Zee found for his "fee."

If this testimony is believed, it appears the agreement between Vander Zee and Savage/Fogarty and the agree-

ment that implemented it, the alleged contract between Vander Zee and Karabatsos, violate the historic public policy against payment of Government funds for "influence peddling." Technically, the alleged contract between Vander Zee and Karabatsos may not violate the rules of law prohibiting contingent fees for securing Government contracts. It is the conviction of the Court, however, that it partakes of the same evil sought to be avoided by those rules of law. If the contract existed, it was the vehicle used by Vander Zee and Savage/Fogarty to avoid a technical violation of the law, because Savage/Fogarty could not have paid Vander Zee a contingent fee to secure the lease since Vander Zee was not a licensed real estate agent. Furthermore, the alleged contract represents an indirect disbursement of public funds for no real service whatever. It tends to introduce elements other than the economy and efficiency of meeting public needs into the process of awarding Government contracts and is therefore against public policy. *Providence Tool Co.* v. *Norris*, 69 U.S. (2 Wall.) 45, 54 (1864).

B. The Motion for a New Trial.

As an alternative to his motion for judgment n.o.v., the defendant has moved for a new trial. Rule 50(c) of the Federal Rules of Civil Procedure provides that if a motion for judgment n.o.v. is granted, the court shall also rule conditionally on an alternative motion for a new trial by determining whether it would be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial.

The Court reads defendant's motion as requesting a new trial on two grounds: (1) the verdict was against the weight of the evidence and (2) the damages awarded were excessive.

Rule 59 of the Federal Rules of Civil Procedure does not enumerate the grounds upon which a new trial may be

granted. The most common grounds upon which such motions have been granted are those specified by the defendant—the verdict is against the weight of the evidence or the damages are excessive. It is clear, however, that a trial judge has a right, indeed a duty, to order a new trial if he deems it in the interest of justice to do so. *Eastern Air Lines* v. *Union Trust Co.*, 239 F.2d 25, 30 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 942 (1957).

The evidence in this case, taken as a whole, clearly indicates that the contract sued upon never existed. The verdict was, therefore, clearly against the weight of the evidence. In addition, the Court believes a miscarriage of justice would result if the verdict were allowed to stand. It must therefore conditionally grant the motion for a new trial.

Because we conditionally grant the motion for a new trial on the issue of liability, it is not necessary for the Court to decide whether a partial new trial need be granted on the issue of damages.

An Order consistent with this Memorandum Opinion has been entered today.

/s/ JOHN H. PRATT
UNITED STATES DISTRICT JUDGE

March 3, 1977

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil No. 76-0468

REIN J. VANDER ZEE,

Plaintiff,

v.

KIMON KARABATSOS,

Defendant.

ORDER

This matter came before the Court on defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

For the reasons set forth in the accompanying Memorandum Opinion, it is this 3rd day of March 1977,

ORDERED that defendant's motion for judgment notwithstanding the verdict be, and hereby is, granted;

ORDERED that the Clerk of the Court enter judgment for defendant; and

ORDERED that defendant's motion for a new trial be, and hereby is, conditionally granted pursuant to Rule 50(c) of the Federal Rules of Civil Procedure.

/s/ JOHN H. PRATT
UNITED STATES DISTRICT JUDGE